FILE COPY

Supreme Court of the United States

OCTOBER TERM, 1948

No. 765

THE GRAYSON SHOPS INCORPORATED (of California) name changed to GRAYSON-ROBINSON STORES, INC.,

Petitioner,

v.

HERBERT D. STONE,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

THOMAS A. GAFFNEY,
Counsel for Respondent.

INDEX

CASES CITED

TEXT BOOK CITED

Supreme Court of the United States

OCTOBER TERM, 1948

No. 765

THE GRAYSON SHOPS INCORPORATED (of California), name changed to GRAYSON-ROBINSON STORES, INC.,

Petitioner,

v.

HERBERT D. STONE,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

Statement.

Respondent submits this brief in opposition to the petition for a writ of certiorari to the United States Court of Appeals for the Second Circuit.

Petitioner appealed to the Court of Appeals from a judgment in favor of the respondent in the sum of $150,000, with interest and costs, entered upon a directed verdict in the office of the Clerk of the United States District Court for the Southern District of New York, on November 4, 1948, after a trial before Hon. Simon H. Rifkind, D. J., and a jury.

The Court of Appeals unanimously affirmed the judgment appealed from; and a judgment of affirmance was entered on March 16, 1949. On April 5, 1949, the Court of Appeals denied petitioner's application for a rehearing.

Respondent contends that none of the grounds recognized by this Court as a proper basis for the issuance of a writ of certiorari exists herein; that the controversy between the parties is one wherein petitioner is seeking, upon purely technical and altogether insubstantial grounds, to avoid fulfillment of its contract obligation; and that no question of general public interest is involved herein.

The facts as set forth in the petition for the writ of certiorari, and in the brief in support thereof, are so inaccurately and inadequately presented that it is necessary to include herein a more complete statement thereof.

The Facts.

The action is brought to recover the sum of $150,000, being the unpaid balance upon a contract between respondent and the petitioner, The Grayson Shops Incorporated (of California), name changed to Grayson-Robinson Stores, Inc. (hereinafter referred to as "Grayson") whereby respondent agreed to sell and assign to petitioner and petitioner agreed to purchase and accept an assignment of all respondent's right, title and interest in and to a certain contract for the employment of respondent made between respondent and S. Klein on the Square, Inc.

S. Klein on the Square, Inc., a New York corporation, owns and operates an extensive business in women's apparel and accessories at Union Square and Fourteenth Street, in New York City.

The business was originated and developed by S. Klein, who died in November, 1942. S. Klein left him surviving three daughters and a number of brothers and sisters and other relatives.

In 1928 respondent married the eldest daughter of S. Klein. In 1933 respondent was admitted to practice law

in the State of New York; and he was thereafter consulted from time to time by S. Klein in connection with the latter's legal problems (f. 133).*

For some time after the death of S. Klein his executors continued to operate the business. In order to save the business for the family respondent was active during that period in negotiating for its purchase on their behalf, from the executors.

On April 15, 1944, as a result of such negotiations, an agreement was entered into, pursuant to an offer made to the executors by respondent (on behalf of the children and brothers and sisters of S. Klein) and approved by the Surrogate, whereby the business was acquired by a corporation organized under the name of S. Klein on the Square, Inc., of which all the securities (consisting of debenture bonds, preferred stock, and common stock) were subscribed for and issued to the children and other relatives of S. Klein and a few other interested persons (f. 231).

The agreement (Plaintiff's Exhibit 1 for Identification), of which paragraph 10 was read in evidence, provided in said paragraph that respondent "be and he is hereby hired, nominated, engaged, designated and/or elected president and executive director of said corporation for a period of not less than five years from date, and he shall receive a net salary of not less than $25,000 per year for such service, plus 5 per cent. of the net profits before taxes in each year to be determined at the end of each fiscal year" (ff. 136-138, 148-149).

On December 18, 1944, this agreement of employment between respondent and S. Klein on the Square, Inc. (hereinafter referred to as "Klein") was modified by resolution of the board of directors, approved by vote of all the

---

* References (unless otherwise indicated) are to folio numbers in the record.

stockholders, to provide that respondents salary as president should be $30,000 per year, plus 5 per cent. of the net profits in each year before taxes, and that his employment should be for a period of five years from April 15, 1944; a letter to that effect, signed by Klein and accepted by respondent, was received in evidence as Plaintiff's Exhibit 2 (ff. 143, 449).

Respondent entered upon his duties as president and executive director of Klein on April 17, 1944; and continued in such employment, under his said agreement, until the business was taken over by petitioner on February 28, 1946 (f. 139).

For some time prior to February, 1946, petitioner (a California corporation operating a number of retail shops in California and elsewhere) was eager to acquire the ownership and control of Klein, in New York City (f. 186).

On February 2, 1946, an agreement was entered into by petitioner with the respondent and one Alvin Handmacher (who also had married a daughter of S. Klein), whereby petitioner agreed to purchase all the outstanding securities of Klein for the sum of two and a half million dollars ($2,500,000). This agreement was approved and subscribed to by all the holders (with certain minor exceptions) of the said securities. The agreement was signed on behalf of petitioner by H. Kuchai, its president (Plaintiff's Exhibit 3; also Exhibit 7; ff. 145-147, 174-176).

On February 2, 1946, simultaneously with the making of said last mentioned agreement, respondent and petitioner entered into a contract whereby respondent agreed that in the event of a closing under the said agreement for the sale and purchase of said securities, he would:

> (a) sell and assign to petitioner all his right, title, equity and interest in and to the said agreement of

employment, dated April 15, 1944, between respondent and Klein;

(b) resign as an officer and director of Klein and its subsidiaries; and

(c) refrain, for a period of six years from the date of such closing, from assuming a position of general executive duties and responsibilities with any ladies' apparel department store in the Borough of Manhattan, City of New York.

The petitioner therein agreed that if such closing should take place, it would simultaneously therewith:

(a) accept the said assignment by respondent and accept other written instruments evidencing respondent's resignation and agreement not to compete as aforesaid; and

(b) pay and agree to pay to respondent the sum of $200,000 as follows: $50,000 simultaneously with such closing; $30,000 on January 2, 1947; $30,000 on January 2, 1948; $30,000 on January 2, 1949; $30,000 on January 2, 1950; and $30,000 on January 2, 1951.

It was further agreed therein that in the event of petitioner's default in paying any one of said installments when due and the continuation of such default for a period of 10 days, respondent might, at his option, declare the entire unpaid installments immediately due and payable (Plaintiff's Exhibit 4, ff. 454-459).

The said agreement for the sale and purchase of the securities of Klein granted permission to petitioner to examine, by its attorneys, accountants and other representatives, all records, documents and property of Klein and its subsidiaries; and pursuant thereto an inventory was taken by petitioner's accountants; petitioner's auditors were in touch with the auditors of Klein and examined its

books (f. 350); the minute books and various documents required by petitioner were delivered to it on February 8, 1946; and thereafter, by letter dated February 12, 1946, petitioner advised respondent and Handmacher that petitioner was "prepared to consummate the purchase contemplated by agreement among us dated February 2, 1946" (Plaintiff's Exhibit 12, f. 485).

The closing under the said agreement for the sale of the securities of Klein to petitioner was had on February 28, 1946. The agreement called for the delivery to petitioner of all the outstanding stock of Klein; actually only about 94 per cent. thereof was delivered; but Milton Diamond, who was petitioner's secretary, general counsel and director, testified, in answer to the Court's question, that petitioner was content to take the 94 per cent. (f. 362).

At the same time with the closing of the agreement for the sale of said securities, petitioner paid to respondent the sum of $50,000, representing the first payment due under the agreement with respondent dated February 2, 1946; respondent assigned to petitioner all his right, title, equity, interest and benefits accruing to him under his said employment contract with Klein; and respondent specifically agreed to refrain for a period of six years from assuming a position of general executive duties and responsibilities with any ladies' apparel department store in the Borough of Manhattan, City of New York (Plaintiff's Exhibit 5, ff. 460-463).

Respondent testified that his contract to sell to Grayson his employment agreement with Klein (Plaintiff's Exhibit 4), was prepared by Poletti, Diamond, Rabin, Freidin & Mackay, the attorneys for Grayson (f. 154); and that the assignment to Grayson of respondent's rights under the said employment agreement (Plaintiff's Exhibit 5) was prepared by the same attorneys (f. 155).

Respondent further testified that on February 28, 1946, he resigned as an officer and director of Klein and of its subsidiary companies (f. 155); that since February 28, 1946, he had not engaged, directly or indirectly, in any business relating to ladies' apparel department stores in the City of New York or elsewhere (ff. 156-157); that the payment due on January 2, 1947, under respondent's agreement with petitioner, was not made, and on January 3, 1947, respondent wrote a letter reminding petitioner thereof (Plaintiff's Exhibit 6); but the said payment was not made and no further payment was made (f. 157).

On January 23, 1947, more than ten days after said installment became due, respondent commenced this action; and in his complaint elected to declare the entire amount of $150,000 immediately due and payable under his agreement with petitioner (ff. 17, 159).

Petitioner, in its second amended answer, admitted the making of its contract, dated February 2, 1946, for the purchase of the securities of Klein, and the making of its contract with respondent, dated February 2, 1946, to purchase respondent's interest in his employment contract; and admitted that a closing was had under the said contract for the purchase of securities; that at the time of said closing petitioner paid respondent the sum of $50,000; and that it did not pay respondent the sum of $30,000 on January 2, 1947 (ff. 26-27).

The said amended answer also pleaded certain alleged affirmative defenses and counterclaims. The first so-called defense (relating to claims for certain alleged unpaid items of taxes of Klein) was palpably insufficient in law and was withdrawn by petitioner at the opening of the trial (ff. 129-130).

The other alleged defenses and counterclaims were so far insufficient that the Trial Judge indicated a disposition

to dismiss them upon the petitioner's opening (ff. 96-97); but on petitioner's insistence, he finally decided to hear the evidence, saying to petitioner's counsel "I will let you try your case, but I am fearful of it" (f. 129).

The fears of the learned Trial Judge in this respect were fully justified; for the proof wholly failed to support or sustain any of the alleged defenses and counterclaims; and the Court properly directed a verdict for respondent at the close of the evidence.

From the judgment thereupon entered petitioner appealed to the United States Court of Appeals for the Second Circuit. The Court of Appeals unanimously affirmed the judgment in an opinion wherein it said:

> "We think the trial judge correctly decided that, in support of these defenses, there was not sufficient evidence to go to the jury" (R. p. 195).

The testimony, so far as it is material to the points in issue, is set forth below.

POINTS.

I.

The trial court properly directed a verdict in favor of respondent.

(1)

The rule governing the direction of a verdict has been frequently stated by this Court (*Small Company* v. *Lamborn & Co.*, 267 U. S. 248, 254; *Empire State Cattle Co.* v. *Atchison, T. & S. F. R. Co.*, 210 U. S. 1, 10; *McGuire* v. *Blount*, 199 U. S. 142, 148).

In the frequently cited case of *Small Company* v. *Lamborn & Co., supra* (where the defendant buyer of merchandise endeavored to escape liability on its contract, upon technical grounds, after there had been a fall in the market price of the merchandise), in affirming a judgment for plaintiff entered on a directed verdict, the Court said, in an opinion by Mr. Justice Van Devanter (citing many cases):

> "The rule for testing the direction of a verdict, as often has been held, is that where the evidence is undisputed, or of such conclusive character that if a verdict were returned for one party, whether plaintiff or defendant, it would have to be set aside in the exercise of a sound judicial discretion, *a verdict may and should be directed* for the other party. The view that a scintilla or *modicum of conflicting evidence, irrespective of the character and measure of that to which it is opposed,* necessarily requires a submission to the jury has met with express disapproval in this jurisdiction, as in many others" (Italics added).

In *McGuire* v. *Blount,* 199 U. S. 142, 148, the applicable principle is stated as follows:

> "It is strenuously urged that, whatever the merits of the controversy, there was sufficient proof to require a trial judge to submit the case to a jury; but no rule is better established in this court than that which permits a presiding judge to direct a verdict in favor of one of the parties when the testimony and all the inferences which the jury could justifiably draw therefrom would be insufficient to support a different verdict. It is clear that where the court would be bound to set aside a verdict for want of testimony to support it, it may direct a finding in the first instance, and not await the enforcement of its view by granting a new trial."

In *Pennsylvania R. Co.* v. *Chamberlain*, 288 U. S. 333, 343, the Court said:

> "We think, therefore, that the trial court was right in withdrawing the case from the jury. It repeatedly has been held by this court that before evidence may be left to the jury, 'there is a preliminary question for the judge, not whether there is literally no evidence, but whether there is any upon which a jury can properly proceed to find a verdict for the party producing it, upon whom the onus of proof is imposed.' *Pleasants* v. *Fant*, 22 Wall. 116, 120. And where the evidence is 'so overwhelmingly on one side as to leave no room to doubt what the fact is, the court should give a peremptory instruction to the jury.' *Gunning* v. *Cooley*, 281 U. S. 90, 94. *Patton* v. *Texas & P. R. Co.*, 179 U. S. 658, 660. The rule is settled for the federal courts, and for many of the state courts, that whenever in the trial of a civil case the evidence is clearly such that if a verdict were rendered for one of the parties the other would be entitled to a new trial, it is the duty of the judge to direct the jury to find according to the views of the court. Such a practice, this court has said, not only saves time and expense, but 'gives scientific certainty to the law in its application to the facts and promotes the ends of justice.' *Bowditch* v. *Boston*, 101 U. S. 16, 18."

In *Foye Lumber Co.* v. *Pennsylvania R. Co.* (8th Cir.) 10 F. (2d) 437, 438, it was said:

> "It is the duty of the trial court to direct a verdict at the close of the trial in two classes of cases: (1) That class in which the evidence is undisputed; and (2) that class in which the evidence is conflicting, but of so conclusive a character that the court, in the exercise of a sound judicial discretion, would set aside a verdict in opposition to it. And when the

trial court has directed a verdict upon the latter ground, the appellate court may not lawfully reverse the judgment founded upon it, unless upon a consideration of the evidence it is convinced that it was not of such a conclusive character that the court below, in the exercise of a sound judicial discretion, should not have sustained a verdict in the opposite direction."

The case last cited was recently followed in *Grinnell Co.* v. *Miller* (3rd Cir.) 150 F. 2d 345, 355, where, although there was conflicting evidence, a judgment on a directed verdict was affirmed; the Court said:

> "Otherwise stated, if the evidence is of such conclusive character that a verdict returned for one party, whether plaintiff or defendant, would have to be set aside in the exercise of a sound judicial discretion, the trial court should withdraw the case from the jury and direct a verdict for the other party."

In *Wheeler* v. *Fidelity & Deposit Co.* (8th Cir.) 63 F. (2d) 562, 564, the Court said:

> "While it is a general rule that, in considering a motion for a directed verdict, the evidence produced by the party against whom the verdict has been directed should be considered in its most favorable light, yet, after all, there must be substantial evidence in support of an issue in order to entitle a litigant to have that issue submitted to a jury. And, even where the evidence is conflicting, if it is of so conclusive a character that the court, in the exercise of sound judicial discretion, would set aside a verdict in opposition to it, then it is the duty of the court to direct a verdict."

Applying the rule, as set forth in the above authorities, to the instant case, it is quite evident, upon an analysis of

the evidence, that a verdict was properly directed for the respondent.

The language of the Court in *Houston Oil Co.* v. *Goodrich*, 245 U. S. 440, 441, is applicable to the case at bar, as follows:

> "The propriety of submitting these matters depended essentially upon an appreciation of the evidence. Having heard it all, the trial court concluded there was not enough in support of any one of petitioners' above-stated claims to warrant a finding in their favor, and the circuit court of appeals reached the same result. 141 C. C. A. 264, 226 Fed. 434.
>
> The record discloses no sufficient reason within the rule long observed why we should review the judgment below. *Forsyth* v. *Hammond*, 166 U. S. 506."

(2)

The instant case is, in its essentials, a simple one; though the petitioner (in its pleading, upon the trial, upon the appeal, and in its petition and brief herein) has diligently endeavored to confuse and obscure the issues.

The petitioner Grayson was (according to the uncontroverted testimony) eager to acquire ownership of Klein (f. 186).

The method whereby this was to be accomplished was by the purchase of all the outstanding securities of Klein. Petitioner did in fact acquire all the securities with the exception of a small percentage which petitioner was content to waive (f. 362).

The purchase by petitioner of the securities of Klein did not, of course, affect the existing and outstanding contracts and obligations of Klein—they remained unaffected by the change of ownership of the stock, except in so far as

they were terminated or otherwise disposed of by express agreement.

Among the existing and outstanding contracts was respondent's five-year employment agreement. It had approximately three and one-quarter years to run. It had been fully performed by both parties. No claim is made by petitioner that Klein ever expressed any dissatisfaction with the contract or with respondent's performance thereof. Under respondent's management the business had prospered to the extent that petitioner was anxious to obtain the business and was willing to pay $2,500,000 for it. Respondent was satisfied with his contract; he would doubtless have preferred to have things remain as they were—the business was prosperous, he had a good contract, and his salary and position were secure.

Petitioner, however, wanted the respondent out—if petitioner was to own and operate the business, it wanted its own management (f. 103). Although Diamond, petitioner's secretary, director and general counsel, was evasive in his answers to questions whether petitioner wanted to get the respondent out (ff. 372-374), he finally admitted that such was the fact when he testified, in answer to the Court's question:

> "Q. In your brief you wrote this: 'Because the defendant did not want Stone in the management in any capacity including that of an executive and did not want any possible assignee of his to interfere, it agreed to purchase his rights for $200,000.' That is a correct statement? A. I am sure it must be, yes, your Honor" (f. 375).

The negotiations for the sale to petitioner of the securities of Klein did not originate with respondent—they were worked out by Handmacher (admittedly unfriendly to re-

spondent) and Kuchai, petitioner's president, together with Diamond. Handmacher testified that he and Kuchai were next door neighbors in Harrison, N. Y.; that it was not until he and Kuchai had practically worked out a price that they approached the respondent; and that he did not want respondent to know anything at all about the matter until the offer was substantially formulated (f. 395). The offer was made in Kuchai's letter to Handmacher, dated January 21, 1946, which was prepared in Diamond's office and pursuant to his instructions (Plaintiff's Exhibit 12, ff. 329-331). It is in substance the same as the contract which followed for the sale of the securities.

It was not until Sunday, January 27, 1946, that respondent was called into a conference at Diamond's home in Connecticut—Diamond testified that it was then he met respondent for the first time (f. 328). Respondent was called in only to get his consent (f. 181). The question of respondent's contract came up. Respondent was (as Diamond testified) an important factor in the sale of the securities; he was a substantial owner and he had a contract (f. 331); respondent, with other security holders, had certain priorities before securities could be sold to outsiders (ff. 333-334); and respondent was unwilling to sell unless a satisfactory arrangement was made with respect to his contract (ff. 330-331, 336).

No question was then raised as to the validity of respondent's contract. There was some dickering as to price; there was (as respondent testified) never any question about what his contract was, nor were any representations made by him; all that Diamond said to respondent was that he wanted to buy the contract for less money—respondent had told Diamond he wanted $350,000 (f. 187). The price agreed upon was $200,000; it was to be paid $50,000 upon the closing and the balance in five annual installments of $30,000

each, with a provision for respondent's resignation and agreement not to compete.

Respondent's contract with petitioner (Plaintiff's Exhibit 4) was prepared accordingly, at the same time with the contract for the sale of the securities (Plaintiff's Exhibit 3). Both contracts were prepared in Diamond's office, in accordance with his instructions, and after he had stated what they were to contain (ff. 339-342). Performance of petitioner's contract with respondent was made conditional upon the closing of the contract for the sale of the securities. The two contracts were interrelated and interdependent; they formed parts of a single integrated transaction; they were simultaneously signed and were to be (and were in fact) simultaneously closed. Both agreements—the entire set of simultaneous instruments—were printed by petitioner and bound up by it in one paper under one cover (Plaintiff's Exhibit 7, ff. 174-176).

Diamond testified with respect to an alleged oral representation or warranty which he said had been made by respondent prior to the making of his contract with petitioner; but Diamond's testimony in this respect (as hereinafter pointed out) was *too indefinite to be of any significance or value.* The fact is uncontroverted that petitioner, through its attorneys, accountants and auditors, fully informed itself before the closing with respect to all phases of the transaction. It is significant that while the contract for the sale of the securities contains many express warranties and representations *none was inserted in respondent's contract,* prepared by the same attorneys at the same time.

On the closing of the contract for the securities, the sum of $50,000 was paid by petitioner to respondent; and petitioner received and accepted the assignment of respondent's employment contract, together with his resignation and agreement not to compete.

Petitioner thus obtained everything that it wanted and that it had set out to obtain—it had the business and it had the respondent out.

Thereupon, having obtained all that it wanted, petitioner forthwith proceeded to repudiate its contract with respondent; it determined to pay him nothing more—rather it would take a chance with a lawsuit.

Obviously, there is nothing in petitioner's conduct or present position that merits consideration in equity or good conscience. Nor is there any legal basis for petitioner's position.

Upon the trial respondent established (by proof not controverted in any substantial respect) every element of his cause of action. The making of his contract with petitioner was admitted in the amended answer. In the absence of any showing of a meritorious defense (of which there was no proof whatever) respondent was entitled to the directed verdict and judgment thereon.

Petitioner set up numerous technical objections and alleged defenses, some of which it attempted to support with proof upon the trial; but (as hereinafter more fully appears) they were shown to be wholly without merit and were wholly unsupported by the evidence. That was the view taken by the Trial Judge; and his ruling to that effect has been unanimously affirmed by the Court of Appeals.

(3)

In the first alleged defense set forth in its second amended answer petitioner pleaded an alleged breach of a warranty not contained in the contract sued upon herein, but in the contract (simultaneously executed) for the sale to petitioner of the securities of Klein. Upon the trial petitioner withdrew this alleged first defense. It is only

referred to herein as showing petitioner's understanding and realization that the two contracts formed parts of but a single transaction—that both were essential to make the complete agreement (f. 129).

In the "second defense and first counterclaim" contained in petitioner's second amended answer, it is alleged that respondent represented and warranted to petitioner that his contract, at the time of the assignment of his rights thereunder, was a "valid and subsisting contract, free from any and all defenses or grounds for termination thereof"; that it was not a valid and subsisting contract for the alleged reasons that during the term of the contract respondent (a) without the knowledge and consent of Klein, had "converted to his own use certain goods, wares and merchandise which were the property" of the corporation; (b) caused employees of the corporation, without its knowledge or consent, to render personal services and to supply material and merchandise for respondent's own use, all at the expense and cost of the corporation and without compensating it therefor; and (c) secretly dealt with persons, firms and corporations engaged in selling merchandise to the corporation, and secretly received and accepted for his own use and benefit rebates and allowances from such persons, firms and corporations then engaged in business dealings with the said corporation (ff. 38-40).

It is nowhere stated in the said alleged defense that *Klein* (the other party to respondent's contract of employment) elected at any time or for any reason to terminate its contract with the respondent; or that Klein did not fully recognize and carry out its said contract up to the date of respondent's assignment of his rights therein to the petitioner.

If it be assumed that there existed any of the alleged "grounds for termination" of the contract set forth in said defense (of which, however, there is no proof in the case whatsoever) the most that can be said is that it might have given *Klein* a right (which was never exercised) to terminate the respondent's contract.

Petitioner, although it was the purchaser of the outstanding securities of Klein and the holder of 94 per cent of its stock, could not itself (*as a stockholder*) elect to terminate and avoid the contract made between respondent and the Klein corporation.

Petitioner is not the successor in interest of Klein—petitioner controls Klein solely by reason of its purchase of substantially all the outstanding securities of Klein.

The important fact (which must not be lost sight of) is that respondent's contract of employment was with Klein; if any possible reason existed which would justify the termination or rescission of the respondent's contract, Klein (since it still owns and operates the business and has never assigned or transferred its rights or interests therein to the petitioner) would have *the sole right* to terminate or rescind the contract.

There is no allegation in the amended answer, and there was no proof upon the trial, that Klein ever exercised any alleged right to terminate or rescind the respondent's contract, either before respondent assigned his interest therein to the petitioner, or even after the said assignment and while petitioner was in control of Klein.

In the absence of such an allegation (and proof thereof) the alleged defense and counterclaim was *fatally defective and wholly insufficient as a matter of law* to constitute a defense or counterclaim. The same is true of the other alleged defenses contained in the said amended answer.

This was the view taken by the learned Trial Judge when he indicated that he was disposed to grant respondent's motion to dismiss the defenses on the petitioner's opening (ff. 97, 129).

In the colloquy between the Court and petitioner's counsel the Court said, "So certainly the [employment] contract when made was a perfectly valid and binding agreement" (f. 102); "You are not suggesting that the contract had been canceled before it was delivered" (f. 107); "You [Grayson] could not have fired him until you came into control of the corporation and if you did *it would have been S. Klein that terminated the contract, not Grayson*" (f. 108); "You got it [respondent's resignation] peacefully and peaceably. You paid a price for it. Why shouldn't you pay for it. *I don't see that you made out a case*" (f. 110); "How you put yourself in the shoes of S. Klein here I don't know, • • • The most that I can see, S. Klein had the option at that time, at most, S. Klein had the power to assert a defense to that contract. That is all. *But it did not exercise it, had not exercised it*" (f. 111); and that the petitioner, *as a stockholder,* could not exercise the right which the Klein corporation did not elect to exercise (ff. 112, 116).

The Court might properly have granted the motion to dismiss the alleged defenses on petitioner's opening and directed judgment for respondent on the admitted allegations of the complaint (ff. 97-98). Instead of doing so, the Court gave petitioner an opportunity to prove its case (f. 129).

Petitioner's proofs wholly failed to support the allegations of its pleading; petitioner's case, at its conclusion, was not only weaker than it had appeared on the opening, but it then appeared that *petitioner had failed completely* to establish his alleged defenses. The Trial Court, therefore,

properly granted respondents motion for a directed verdict; and the judgment entered thereon was properly affirmed by the Court of Appeals.

(4)

None of the alleged "infirmities" or "grounds for termination" of the respondents contract (as set forth in said "second defense and first counterclaim") did in fact exist.

For the most part petitioner made no attempt to prove the matters specifically pleaded in the alleged defense.

(a) Thus, with respect to the *alleged secret rebates* and allowances (sometimes termed *"kick-backs"*) which it is alleged in said defense the respondent secretly received from persons, firms or corporations having dealings with Klein, there was not the slightest attempt on the part of the petitioner to prove, or to offer any proof, in support thereof.

Having recklessly made this scandalous charge against the respondent in its amended answer, petitioner conveniently forgot all about it, and *wholly ignored it upon the trial.*

(b) In like manner petitioner made no attempt to prove its allegation in said defense that respondent caused employees of the corporation, without its knowledge or consent, to render personal services and to supply materials and merchandise for respondent's own use without compensating the corporation therefor. The case is wholly devoid of any proof to sustain that allegation.

(c) Nor was there any proof offered by defendant in support of its charge (as set forth in said second alleged defense) that respondent, without the knowledge and con-

sent of Klein, *"converted to his own use"* goods, wares and merchandise which were the property of the corporation.

There is no proof whatever that respondent ever received or obtained any merchandise of Klein which was not (a) either paid for by him or (b) included in the charges upon the books of the corporation which were cancelled (by resolution of the directors and stockholders of Klein) prior to the closing of the transaction with the petitioner—which cancellation was expressly consented to by petitioner in its letter to respondent dated February 9, 1946, wherein petitioner said:

> "We do hereby acknowledge that we have been advised and do hereby consent to the cancellation of certain charges on the books of account of S. Klein On The Square, Inc., in the name of Herbert D. Stone, in the sum of $4,394.49 at cost, or $5,359.13 at ticket price" (Plff's Ex. 9, f. 470).

Apparently it is petitioner's contention that merchandise so charged to respondent on the books of the corporation could be deemed "converted" by respondent within the meaning of the allegation in the amended answer. Of course, this is not so. There is no dispute that no merchandise was taken by respondent unless it was either paid for by him or charged to his account (ff. 226-227). Manifestly there was no *"conversion"* by respondent of merchandise which was fully and accurately entered upon the books of the corporation and charged against respondent thereon—there would thereby be created an *indebtedness* in favor of the corporation, but that would afford no basis for avoiding the contract. The amount of such indebtedness, if not otherwise paid, might be offset against moneys subsequently due and payable to respondent—for one thing, as against his percentage of the net profits payable under his employment

agreement at the end of the fiscal year—a practice which was apparently followed on other occasions (f. 307).

(d) With respect to the cancellation of the charges for merchandise against respondent on the books of Klein, respondent testified that he told Diamond about them—part of the consideration for the sale to petitioner of respondent's employment contract was petitioner's consent to the cancellation of these charges; and that it was Diamond who suggested the adoption by the directors and stockholders of resolutions approving such cancellation (f. 222). Diamond denied this conversation with respondent (f. 322); but admittedly it was he who was "negotiating this deal" (f. 339)—he was in frequent contact with Kuchai and he admitted Kuchai told him that as a result of conversations with respondent, petitioner had agreed to the cancellation of the charges against respondent; and that Kuchai might have told him that such cancellation had been approved by the directors and stockholders of Klein (f. 357).

The minutes (Defendant's Exhibits B and C) recite that respondent informed the directors and stockholders that the charges were for goods distributed to various persons for the general good and welfare of the firm (ff. 507, 510); whereas respondent testified that while some of the goods were distributed for the good of the firm, they were preponderantly purchases for himself, his wife and children (f. 225); he told that to the directors, and they knew it (ff. 222-223); and he told it to the stockholders (f. 225). Respondent said the minutes did not accurately recite what he told the directors and stockholders (f. 223). It was Diamond who suggested (as respondent testified) not only that resolutions should be drawn, but he indicated the way they should be drawn—"the minutes were set forth as desired by Mr. Diamond" (f. 223). Respondent testified

that he did not state to Kuchai, in words or substance, that said goods had been distributed for the good and welfare of the corporation (f. 221), and his testimony in this respect is not denied—significantly, Kuchai (though petitioner's president) was not called by petitioner to take the stand.

Petitioner contended below that there were defects in the adoption of the said resolutions with respect to quorum and voting which rendered the resolutions invalid. As was brought out by the Court's questioning, however, Klein was a closely held corporation—*substantially a family corporation*—where compliance with formal technical requirements (that might otherwise be insisted upon) were not strictly essential (*Gerard* v. *Empire Square Realty Co.*, 195 App. Div. 244, 249, and cases there cited). Thus it appears (in the course of petitioner's direct examination of respondent):

> "By the Court:
>
> Q. Let me ask one question. Were all the stockholders of S. Klein before this transaction all members of the S. Klein family? A. Yes.
>
> Q. Or employees? A. Yes.
>
> Q. It was not a publicly held corporation? A. No.
>
> Q. That was a private enterprise? A. Yes.
>
> Q. How many stockholders were there? A. I would say about 30.
>
> Q. Mostly members of the family? A. Predominantly members of the family and a few outside interests who made up sufficient funds to acquire the business from the executors pursuant to the Surrogate's decree" (ff. 230-231).

Petitioner's counsel asked respondent if there were not approximately 65 stockholders (instead of about 30, as respondent had testified) but reference to the list of stockholders printed by petitioner as a part of Plaintiff's Exhibit

7 (at page 11 thereof) shows that there were (excluding duplications) approximately 38—most of whom (it is not disputed) were in some way related to S. Klein or were employees of Klein.

Moreover, the books containing the minutes of the meetings of the directors and stockholders of Klein, with other documents requested by petitioner, were delivered to petitioner's attorneys for full and complete inspection and examination on February 8, 1946 (ff. 354, 481-483, Plaintiff's Exhibit 11). Diamond testified, in answer to the Court's questions:

> "By the Court:
>
> Q. So that the members of your staff could look at them? A. Yes.
>
> Q. And assure themselves that everything was in apple pie condition? A. Yes.
>
> Q. You were buying a two and a half million dollar property and you were representing your client and you were going to see that everything was all right? A. Yes, sir (ff. 351-352).

Diamond testified that Adler, his associate who principally handled the matter in his office (and who was not called as a witness) told him that he had examined the minute books (f. 359); and Diamond further testified:

> "By the Court:
>
> Q. You wanted to be sure that you were getting a satisfactory deal. You did not want to buy a lawsuit, and you examined the minute books with that end in view. A. Yes, sir.
>
> Q. And he [Adler] made no objection or raised any question? A. He raised questions at various times during the examination, but I don't remember on what subjects they were.
>
> Q. But they were resolved? A. But they were resolved" (f. 360).

The closing did not take place until February 28, 1946; so that *for 20 days* petitioner's attorneys had the minute books in their possession and subject to their examination.

They had the fullest opportunity prior to closing (if they were not satisfied with the minutes or the proceedings as recorded therein) to make objections (as to quorum or otherwise) and cause corrections therein to be made or further proceedings to be had. In fact, it was on February 12th, *four days* after delivery of the minutes and documents to petitioner's attorneys, that Diamond wrote respondent that they were prepared to consummate the purchase (Plaintiff's Exhibit 12, f. 485). Respondent testified, also in response to the Court's questions:

"By the Court:

Q. Who represented Grayson at that closing? A. Poletti, Diamond, Rabin.

Q. Who in particular; which lawyer? A. Mr. Diamond.

Q. He examined all of this corporate business? A. That is right.

Q. He expressed himself as being content with it? A. Yes.

Q. And authorized his client to pay the money? A. That is right; and they did pay" (ff. 216-217).

(5)

Petitioner having failed to show that respondent had converted to his own use *any merchandise* of Klein (as alleged in the said defense in the amended answer) it endeavored to prove upon the trial that respondent had taken *other property* (nowhere referred to in the said defense) belonging to the corporation, and that such taking was a ground for termination by Klein of the employment contract; but in this respect also petitioner's efforts were not only *wholly unsuccessful*, but they bordered on the ludicrous.

(a) For one thing petitioner tried to show that respondent had taken certain items of furnishings from the club house on 15th Street, which had been maintained by S. Klein personally (apart from the business) for the benefit of his employees. It appeared, however (and it is undisputed) that in addition to the furniture and equipment of the club house (which had been sold by the executors to the Klein corporation, f. 269) there had been brought into the club house (prior to the death of S. Klein) certain personal effects belonging to S. Klein which under his will were given directly to his children—it was only these personal effects of S. Klein which respondent caused to be moved away and which he then distributed to his wife's sisters (ff. 271-272).

Certain other items of property about which petitioner's counsel inquired were (according to the undisputed testimony) articles which respondent had personally purchased from auctioneers at 11th Street and University Place and had caused to be delivered at the Klein driveway on 13th Street; they were there picked up for delivery to respondent by the Weisberger Moving & Storage Company; they were never in the club house—they were the articles included in the list read by petitioner's counsel at folios 234-236.

The club house furniture and equipment bought from the executors by Klein were distributed in different parts of the Klein building—some were put in respondent's office as president; they were left there by respondent upon his resignation (ff. 240-241).

There were certain other articles of furniture in respondent's office which belonged to him and which he had brought there from his home; they were all his personal property and he removed them (f. 242). He told Diamond of this furniture and Diamond said "Take it out" (f. 249).

Petitioner's letter of February 9, 1946 (Plaintiff's Exhibit 9) listed these articles of furniture belonging to respondent and consented to his removing them (ff. 471-472). There were a bookcase and sets of books in the club house, which were purchased by Klein from the executors; they were not taken to respondent's private office—they were taken down to the employee's lounge in the main Klein building for the use of the employees (f. 245). Nat Cohen, about whom petitioner's counsel inquired and who was a clerk at Klein's, did not take (it is undisputed) any books away for the respondent (f. 247); he took only certain cartons containing respondent's personal stationery and his legal papers (f. 247). When respondent moved down to Klein's he had brought with him his own typewriter and law furniture—when respondent moved from Klein's, he removed this typewriter and furniture (f. 249).

(b) Petitioner's effort in this connection resolved itself finally into nothing more than an attempt to show that respondent had converted a *radio* (upon which petitioner placed great stress in its brief in the Court below and upon this application); in this attempt also petitioner was wholly unsuccessful. The value of this used radio does not appear; nor whether its taking, as alleged by petitioner (if true) was a matter of any moment. The testimony for petitioner in this respect was that of one Lauterbach (employed at Klein's as an engineer); he testified that one day as he was walking through the club house with respondent, he remarked to respondent that "some son-of-a-bitch even took that radio out of the wall," whereupon respondent laughed and said he took it (ff. 282-283). Lauterbach first said this conversation took place in the summer of 1945 (f. 281); then he said, on cross examination, that he could not say whether it was 1945 or 1946—it was in the summer

months (f. 285); on his examination before trial he had testified that it was in the summer of 1944 (f. 287)—which would have been before the making of respondent's supplemental contract of employment whereby in December, 1944, Klein (by unanimous vote of its directors and stockholders) increased respondent's salary. Respondent denied that any such conversation as Lauterbach testified to ever took place (f. 245); but even if it did, respondent's facetious or *laughing remark* (as Lauterbach described it) falls far short of proving that respondent *converted* the radio—assuming that respondent did take out the radio (of which there was no proof), for all that appears (and in consonance with Lauterbach's testimony) respondent may have taken it over to the Klein building and left it with the other articles in the employees' lounge or elsewhere for the use of the employees.

The insignificance of this radio item (in view of the fact that the parties were dealing with contracts involving $2,500,000 and $200,000 respectively) does not warrant the discussion devoted to it or the emphasis placed upon it by petitioner. Still less important is the petitioner's questioning of respondent with respect to the dictionary and stand (f. 276). Petitioner tried to show that respondent had told Lauterbach he had taken a dictionary and stand. Respondent denied any such conversation; and Lauterbach (though examined as a witness by petitioner) was not asked about it and made no mention of it. Respondent testified that the dictionary and stand were removed from the club house to the employees' lounge in the main Klein building—he did not personally take the dictionary and stand (ff. 276-277). It is only referred to here as indicating petitioner's desperate effort to find in the record *some object of criticism—no matter how slight or petty, or how wholly unsupported by proof.*

That part of the opinion of Vann, J., in *Callanan* v. *K. A. C. & L. C. R. R. Co.*, 199 N. Y. 268, 284 (cited by petitioner in the Court below as the leading case, which was quoted at length in the petitioner's brief on the appeal) may well be applied to petitioner's efforts to spell out a case for rescission herein, as follows:

> "It is not permitted *for a slight, casual or technical breach,* but, as a general rule, only for such as are material and willful, or if not willful, *so substantial and fundamental* as to strongly tend to defeat the objects of the parties in making the contract." (Italics added).

(6)

Petitioner, as a last resort, attempted to show that something in connection with the checks for $50,000 and $13,000 (nowhere referred to in any of the alleged defenses in the amended answer) might have afforded *Klein* a right (which it never exercised) to terminate respondent's employment contract. This attempt, also, was wholly unsuccessful.

(a) Briefly, the facts with respect to the $50,000 check are as follows: In order that respondent's efforts to save the business for the family of S. Klein should be successful, it was necessary to raise and pay to the executors before April 15, 1944, the sum of $1,007,000.

To make up the total of this large amount and to enable the deal to be put through (for the benefit of the family, relatives and employees) respondent borrowed from the Marine Midland Trust Company (on his own and his wife's signatures) $150,000 on a four months' note (ff. 252-253, 293, 296).

Respondent paid $50,000 on account of the note in May, 1944, leaving a balance of $100,000. In August (when the

note became due) the bank called for a further part payment; respondent took it up with members of the executive committee and as a result of talking with them, on August 11, 1944 respondent drew a corporate check for $50,000 to his own order, deposited it to his account, and paid the amount to the bank (f. 254). *Nineteen days later,* on August 30, 1944, the loan was repaid. In order to repay the loan respondent borrowed $50,000 from two of the directors of Klein (f. 254).

The loan was recorded on the books of the corporation—respondent advised the bookkeeper to make a note of it, and the accountants and auditors of the corporation were fully advised of it (ff. 254, 256). The check stub showed that the check was made payable to respondent, and had a notation thereon "Even Exchange" (ff. 257-526). The whole transaction was disclosed on the books—there was nothing concealed or secret about it. Handmacher, who was a member of the executive committee, testified that he did not recall any conversation with respondent about the withdrawal of $50,000 (f. 384); and that he first learned of the withdrawal when he was subpoenaed to testify at the trial (f. 386). On cross-examination, however, when Handmacher was asked if he knew that Mr. Berkeley and Mr. Rosenblum (two of the members of the executive committee) each loaned respondent $25,000 to repay the money borrowed from the company, he answered that he knew respondent had borrowed some money, but he did not know from whom —*he knew in 1944* that respondent had borrowed some money, but he said he did not know he had borrowed the money from Rosenblum and Berkeley (f. 392). Handmacher, who was respondent's brother-in-law, at first denied that he asked respondent for any part of the proceeds of the sale of respondent's employment contract to Grayson—

then he qualified that answer by saying that he did not ask for any part of the said proceeds *on behalf of himself*, but did ask on behalf of his wife and her sisters (ff. 407-408). Handmacher admitted his unfriendliness toward respondent ever since they had come into the store (f. 397); he denied that the unfriendliness developed as a result of respondent's refusal to recommend a salary for Handmacher as chairman of the board of directors; but he said he was promised a number of things, and respondent failed to recognize or remember any of the promises respondent had made to him (f. 397); and that there had been an understanding about salary but it was only between respondent and himself (f. 400).

Petitioner developed (with respect to the $50,000 check) as the Trial Judge said, *"Nothing but a disclosed transaction.* It appeared on the books of the corporation" (f. 255).

(b) With regard to the check to respondent for $13,000, dated September 5, 1944, respondent testified it was a temporary loan, entered on the stub in the check book *in his name* as an "Even Exchange", after discussion with one or more members of the executive committee (ff. 264, 527); *it was fully disclosed on the books* of the corporation; the accountants and auditors were apprised of it and knew what the transaction was (ff. 264-265). The $13,000 loan was repaid before the end of the month, viz., *on September 28, 1944* (f. 265). Both this loan and the $50,000 loan were discussed with the directors (f. 275).

Respondent testified, with reference to the $13,000 check dated September 5, 1944, that the Klein fiscal year ended September 30th and that there would be an estimated sum then due him by virtue of his five per cent. agreement in excess of $13,000 (ff. 306-307); but on recapitulation, by

virtue of certain allowances and expenditures made for improvements (whereby the net profits were reduced) the sum then payable to respondent was reduced to $4,309.96 (ff. 307, 426)—respondent's impression at the time of drawing the $13,000 check was that there was actually coming to him from the corporation at the end of that month a sum in excess of the $13,000 (f. 307)—in any event the whole amount of $13,000 was repaid before the end of the month.

(c) In summary, with respect to the two checks, these matters took place approximately a year and a half before the closing of petitioner's purchase of the Klein securities, during which period they were not questioned by anyone. They appeared openly on the books of the corporation. Jayson, a public accountant associated with Alson & Brown, the accountants for Klein, testified that he worked on the audits for the months of August and September, 1944 (f. 411), and the books for those months showed these withdrawals (with the check stubs showing respondent's name and the notation "Even Exchange"); and the return of the moneys in each case within the month (ff. 418-420). Klein was at all times fully advised about the transactions; and never objected thereto. It was approximately three months after the second of these check transactions that the respondent's salary as president and executive director of Klein was increased by resolution of the board of directors and the unanimous vote of all the stockholders (f. 449).

Petitioner apparently attached some significance to the fact that the transactions did not appear in the monthly financial statements of Klein, but, as the Trial Court said (and as Handmacher agreed) "The transaction having been liquidated inside of a month, it would not appear on the financial statement" (ff. 389-390).

Petitioner's accountants and auditors examined the books of account (showing the said transactions) before the closing (f. 350). Petitioner, after such examination, expressed itself as satisfied, and prepared to close and did close the deal (f. 485).

Under all the circumstances it is apparent that the transactions with respect to the checks (which were plainly, as the Court below said, at the most "technical irregularities") would have afforded Klein no basis or ground for terminating respondent's employment contract—still less has the petitioner any right to raise any question in that regard.

(7)

Petitioner relied greatly in the Court below on the alleged representation which it claims was made by respondent to Diamond that respondent's contract of employment was a valid contract "free from infirmities".

The alleged representation is repeated many times in petitioner's petition and brief; as though by frequent repetition it might gain some added strength.

(a) Petitioner's position in this respect is without any support in the record. In the first place Diamond's testimony did not establish the making of the alleged representation. Diamond said, on his direct examination, that respondent told him he had a valuable contract "free from infirmities" (f. 316); though respondent denied the making of any such statement (f. 187).

On cross-examination, however, Diamond admitted that he was unable to testify that respondent used the words quoted—he said that was *the meaning he placed upon them* (f. 345); that was *his understanding* of the words used (whatever they were) (f. 346). He testified merely to *his*

interpretation of what respondent said, without testifying, either in words or substance, to what respondent did say (ff. 344-346). His testimony falls far short (as a matter of law) of affording a basis for avoiding a contract on the ground of alleged misrepresentation or alleged fraud.

The alleged statement, even if it were made, was wholly insufficient to make out a case of alleged misrepresentation or fraud. *For one thing, it was true.* The so-called "infirmities" (or "grounds for termination") which petitioner contends existed in respondent's contract, were either those specifically pleaded in the petitioner's second defense in its amended answer (which were *abandoned without proof* upon the trial) or the new objections (not pleaded) raised for the first time on the trial—with respect to which (as hereinabove pointed out) petitioner wholly failed to make out a case.

(b) As far as concerns petitioner's claim of alleged *fraud* (which constitutes the second alleged counterclaim in petitioner's amended answer) none of the elements essential to fraud was here present.

The respondent's alleged statement that he had a valuable contract was true—it was at the time of its assignment *an existing contract of great value, and was so regarded by both the parties thereto.*

Moreover, there was no proof of the element (essential to fraud) of reliance upon the alleged statement—on the contrary, it is negatived by the testimony on petitioner's behalf. Petitioner, through its attorneys, auditors and accountants, made a full and complete *independent investigation*—and it was as a result of that independent investigation that petitioner announced it was satisfied and prepared to go ahead and close the transaction. Where a party relies on his own investigation and not on the alleged

representation, he cannot, so far as a charge of *fraud* is concerned, base such a charge upon the representation, for the purpose of avoiding a contract which he makes in reliance on his own investigation. (*Eppley* v. *Kennedy*, 131 App. Div. 1, 5 [rev'd on another ground 198 N. Y. 348]; *Sacramento Suburban Fruit Lands Co.* v. *Klaffenbach*, 40 F. 2d 899, 903.)

Petitioner knowingly and willingly (after full and careful investigation) entered into the agreement with respondent for its own benefit and advantage.

Petitioner in its brief admits the making of its investigation of Klein's books and papers prior to the closing of the contracts on February 28, 1946; but says that the investigation was made with reference to the contract for the sale of the securities and not the contract for the assignment of respondent's employment agreement—this attempted hair-splitting is, however, wholly ineffectual—the two contracts were interrelated; one was conditional on the other; the petitioner's investigation was made for all purposes and included all the books and papers; at its conclusion petitioner expressed its satisfaction therewith and both contracts were thereupon closed at the same time on the same day. The importance of the investigation (from petitioner's point of view) was brought out in Diamond's testimony, in answer to the Court's questions (ff. 351-352, 369).

(8)

Petitioner further contends that it may not be held to the promise it made to respondent for the reason that there was *an alleged failure of consideration* therefor. But here again there is no basis for petitioner's contention.

(a) This alleged failure consideration is based mainly upon petitioner's claim that respondent did not sell and

assign to petitioner "a valid and subsisting contract free from infirmities"—in other words, it is the same contention on the part of petitioner (so frequently repeated in its petition and brief) which has been heretofore considered herein and shown to be without merit. Respondent had an existing valuable contract; and the so-called "infirmities" which petitioner alleged or sought to prove therein simply did not exist.

(b) It was further set forth in petitioner's alleged "second defense and first counterclaim" and urged by petitioner upon the trial and in the Court below that respondent's agreement with petitioner to resign as an officer and director of Klein and its subsidiaries constituted no consideration, for petitioner's promise to respondent, for the reason (as alleged by petitioner) that respondent was already bound by the contract for the sale of the securities to resign as officer and director.

The agreement whereby petitioner agreed to purchase the securities and its agreement to purchase respondent's interest in his employment contract were (as more fully pointed out above) parts of a single transaction. The agreements were made on the same day; they were simultaneously executed; they were caused by petitioner to be printed and bound together under one cover (Plaintiff's Exhibit 7, f. 175); petitioner's agreement with respondent for the purchase of his interest in the employment contract was made conditional, and only to become effective, upon the closing of the contract for the purchase of the securities; and respondent would not have entered into the agreement for the sale of the securities unless petitioner had agreed to purchase his interest in the employment contract (f. 336). *The elements of consideration for the one agreement entered into and formed part of the other.*

The contract for the securities contained the broader provision for the general resignation of "all directors, officers, attorneys-in-fact and agents of the corporation and its subsidiaries" (f. 452); petitioner's agreement for the purchase of respondent's interest in the employment contract contained his specific agreement "to resign as an officer and director of said company and its subsidiaries"—neither agreement for resignation preceded the other (as petitioner contends herein); they were simultaneous and formed parts of the entire transaction.

Moreover, as appears from the colloquy between the Trial Court and petitioner's counsel, petitioner attached a special value and importance to respondent's specific resignation—petitioner was evidently of the impression that under the provision for the general resignations respondent would still remain as manager or executive director (ff. 126-127); and the specific agreement was to make sure that respondent's relation to Klein *was in all respects severed* (f. 375)—petitioner wanted respondent out in all capacities and for all purposes. In this view petitioner plainly regarded the specific agreement for respondent's resignation as having a special value; and as constituting a special consideration for petitioner's promise.

As Diamond testified, it was "because defendant did not want Stone in the management in any capacity including that of an executive and did not want any possible assignee of his to interfere, it agreed to purchase his rights for $200,000" (f. 375).

(c) It is said further by petitioner that respondent's promise in his agreement for the sale to petitioner of his interest in his employment contract "to refrain for a period of six (6) years from the date of closing from assuming a position of general executive duties and responsibilities with

any ladies' apparel department store in the Borough of Manhattan", furnished no consideration for the petitioner's promise sued upon herein, for the reason, as alleged by petitioner, that respondent had already made such a promise in petitioner's agreement to purchase the Klein securities.

That there is nothing to petitioner's contention in this respect is r .dily demonstrated. The provisions in the two agreements are essentially and materially different.

The provision in the agreement to purchase the securities of Klein merely restrains the officers, directors, debenture holders or stockholders of S. Klein on the Square, Inc., from entering upon a competitive business *"under the name 'Klein'* or any imitation or simulation thereof" (f. 451)—this paragraph does not limit or restrain the respondent generally from engaging in a competitive business—it restrains him merely from engaging in such a business under the name *"Klein or any imitation or simulation thereof"* (See also the clarifying letter, ff. 495-496). Respondent might under this agreement engage in a similar or competitive business as long as it was not under the name "Klein" or any imitation thereof. This is very different from the restraint imposed upon respondent in his contract with petitioner (which is the subject of this action) whereby respondent was obliged generally "to refrain for a period of six (6) years from the date of the closing from assuming a position of general executive duties and responsibilities with any ladies' apparel department store in the Borough of Manhattan, City and State of New York."

Respondent, as president and executive director, had successfully managed and operated the Klein business for nearly two years; it was, accordingly, to petitioner's advantage to restrain respondent for the period named "from

assuming a position of general executive duties and responsibilities" with any other ladies' apparel department store in the Borough of Manhattan. The restrictive covenant was plainly regarded by petitioner as something of substantial value; that was why petitioner, in the prospectus and registration statement which it filed with the Securities and Exchange Commission on March 4, 1946 (upon its application for approval of the issuance of new securities) recited (as one of the advantages of its purchase of respondent's employment contract) that respondent had agreed to resign as an officer and director of Klein and its subsidiaries and to refrain for six years "from assuming a position of general and executive duties and responsibilities with any ladies' apparel department store in the Borough of Manhattan, City and State of New York" (ff. 365-370), (Plaintiff's Exhibits 13 and 14).

In this connection it might be noted that although petitioner, in these documents filed with the Securities and Exchange Commission (four days after the closing of the Klein transaction) purported to set forth all the advantages resulting to petitioner from the transaction and to put it in the most favorable light, petitioner nowhere mentioned therein any of the alleged warranties or representations which are now claimed to have been made by respondent.

(d) In any event, it may be said that a sufficient consideration for petitioner's promise is found in the *detriment* to respondent (in his change of position whereby he gave up rights which were to him of great value, with an assured income); and in the *advantages* to petitioner, even though (as the Courts below have pointed out) they might be nothing more than freedom from a lawsuit, in which petitioner (in its effort to oust respondent) would certainly have been otherwise involved (ff. 104, 110).

(9)

In the so-called "third defense and third counterclaim", which was first pleaded in its second amended answer, petitioner alleges that respondent's employment contract was one for personal services; that as such it was not assignable without the consent of Klein, which consent it is alleged was not obtained; and that, therefore, respondent's assignment to petitioner of his rights in said contract was not valid and constituted no consideration for petitioner's promise. It might be said that throughout the proceedings that culminated in petitioner's purchase of the securities and of respondent's contract, petitioner was represented by counsel (who prepared both contracts)—it is now very late in the day for petitioner to raise this highly technical objection.

It is evident that in this alleged defense (and in its argument in support thereof) petitioner has confused the situation here presented with cases where the purpose of the attempted assignment of a contract for personal services is to substitute another to perform and carry out the contract in lieu of the assignor. Of course, that cannot be done without the consent of the employer—the employer has the right to say by whom the services to be rendered to him shall be performed. The rule has been stated: "A contract for services personal in their nature cannot be assigned by the employee *so as to enable the assignee to require the employer to accept performance by him*" (Clark, New York Law of Contracts, vol. II, §763, p. 1134). The cases cited in petitioner's brief in support of that proposition are not questioned herein.

The situation, however, is manifestly different where (as here) the employee's interest in his employment contract is acquired by another, not for the purpose of enabling

the other to perform the contract, but to *terminate* the contract and *extinguish* the employee's rights thereunder—where, as is said in petitioner's brief "the purpose of the assignment is not to obtain benefits under the employment contract, but to terminate the acquired rights." As the Trial Court said, in the colloquy with petitioner's counsel, "Actually you were merely buying freedom from his presence in the plant" (f. 108), "You didn't become the beneficiary of the five per cent profit when he sold you that contract. You didn't become the beneficiary of his salary payments * * *. All you had was freedom from Stone's presence in the management" (ff. 113, 118).

In any event, consent of Klein to the assignment of the employment contract was obtained herein. The board of directors, at the meeting held on February 5, 1946, and the stockholders, at the meeting held on the same day, were fully advised (as respondent testified, and it is undisputed) with respect to both agreements entered into with petitioner—the directors and stockholders did not need to be advised of the agreement with petitioner of February 2nd for the sale of the securities, inasmuch as they were all parties thereto (Plaintiff's Exhibit 7); and they doubtless knew also of the respondent's separate agreement with petitioner made at the same time and as part of the same transaction—that they were fully advised appears from the minutes of both meetings (ff. 504, 509). Formal consent, however, on the part of the directors and stockholders to the assignment of respondent's employment contract, was evidently wanted by petitioner in order to make the record complete; and such consent (at petitioner's request) was given accordingly.

At the special meeting of the board of directors there were six directors present (including respondent) out of a total of ten members. The resolution approving the assignment of respondent's contract was voted unanimously

(f. 504). Petitioner contends, however, that the vote was invalid for the reason that respondent's presence was necessary to make a quorum; but the meeting was called to transact and did transact other business (for which there was unquestionably a quorum) than the voting of this particular resolution. Moreover, the assignment which the directors approved was not anything that conferred a benefit on respondent *at the expense* of the corporation of which he was an officer and director—respondent did not thereby acquire anything from the corporation—wherein the instant case is distinguishable from the cases cited on this point in petitioner's brief.

With respect to the stockholders' meeting it was said by petitioner in its brief in the Court below that no waiver of notice of the meeting appears in the minutes. Respondent testified (and it is not disputed) that a waiver was signed by all the stockholders—those not present at the meeting signed it subsequently either at respondent's or Diamond's office—every single stockholder signed it (ff. 214-216); and that the waiver was turned over to Diamond or to Adler, who was not called as a witness by petitioner (f. 217).

As hereinbefore pointed out, the books containing the minutes were delivered to Adler on February 8th; he examined them, and Diamond testified (in answer to the Court's question) that any questions Adler raised were satisfactorily resolved (ff. 359-360). Petitioner had the minutes *for a period of 20 days* prior to the closing.

It is now far too late for petitioner to raise technical objections in connection with the minutes as to matters (either with respect to quorum or the proceedings had at the meetings) which could readily have been obviated at the time and which were then acquiesced in and approved by petitioner.

II.

In Reply to Petitioner's Brief.

(1) It is said (on page 15 of petitioner's brief) that its agreement to pay $200,000 to enable Klein to terminate the employment contract was "premised on the assumption that that purpose could not be achieved *free of charge.*"

This statement brings out (more candidly than most of the petitioner's brief) its real aim and purpose; and at the same time plainly illustrates the unsoundness of its position and the fallacy of its argument.

Petitioner's grievance is apparently that it agreed to pay respondent $200,000 for what it alleges it might have had *for nothing*—that facts which it is alleged were unknown to Klein or petitioner until after the closing "would have allowed Klein to terminate the employment contract *without any cost* to itself or petitioner."

The unsoundness of petitioner's position in this respect is readily demonstrated. Petitioner assumes that it could have obtained the securities and control of Klein without the purchase of respondent's employment contract. But the fact is, of course, otherwise. Petitioner could not obtain the securities and the control of Klein (to enable it to exercise any alleged right that Klein might have to terminate the contract) unless the respondent consented thereto and joined in the agreement for the sale of the securities. *This the respondent would not do* unless an agreement for the sale of his employment contract was entered into at the same time.

Respondent concededly was a substantial owner of the securities, and he had certain priorities affecting the right of other stockholders to part with their shares of stock to outsiders (ff. 333-334)—his consent was essential if there

was to be a sale of the securities to petitioner; and his consent could not be had unless petitioner bought out his employment contract. There was, therefore, no way in which petitioner could obtain, with respect to respondent's employment contract, the "free ride" at which it now looks so longingly.

It is said several times in petitioner's brief that a "tentative agreement" for the sale of the securities was negotiated before the question of respondent's contract came up—it could not have been otherwise than "tentative", because without the agreement for the purchase of respondent's employment contract, there never could have been any agreement for the sale of the securities.

(2) If in any way petitioner could have obtained the securities and control of Klein, without at the same time purchasing respondent's employment contract (which, as shown above, was impossible) and then petitioner had caused Klein to terminate respondent's employment, petitioner would have undoubtedly been involved in litigation of a most serious character. This was, in part at least, what the Courts below referred to when they said that by the purchase of respondent's employment contract, petitioner was buying its freedom from a lawsuit. It is, therefore, difficult to understand petitioner's statement (on page 25 and elsewhere in its brief) that there is no support whatever in the record for the finding of the Courts below "that petitioner's object was to get rid of respondent without a lawsuit or dispute"—it is too plain for further discussion that if petitioner had attempted to get rid of respondent in any other way than by the purchase of his employment contract, a formidable lawsuit would surely have followed.

(3) Petitioner refers in its petition and brief to the Court's modification of its opinion on the denial of the petition for a rehearing. In its opinion as originally prepared the Court below said that Diamond's testimony as to the alleged representation made to him by respondent "was not enough to serve as a foundation for a defense of fraud or misrepresentation, or express warranty." In this the Court was (as shown more fully on pages 33-34 hereof) undoubtedly correct. In order, however, that there might be no misunderstanding or uncertainty with regard to the basis of its decision, the Court modified its opinion to say that it would regard Diamond's testimony (vague and uncertain as it was) as amounting to an express warranty, but that, nevertheless, it would afford petitioner no basis for relief herein—for the reason that the alleged express warranty (if made) was *true*—respondent had a valuable contract which he was surrendering and as to which there existed no ground whatever, at the time of its assignment by respondent to petitioner, on which it could be assumed that Klein would terminate (or would have any right to terminate) the contract.

(4) Petitioner, in its petition and brief, misinterprets the opinion of the Court below where it said that the meaning of the alleged express warranty was "only that Stone was giving up a valuable contract which would not be rescinded by Klein." It is said by petitioner that neither the Court nor respondent had any means of knowing that Klein, after petitioner had obtained his control, would not then rescind respondent's employment contract. Here again petitioner assumes that it could have obtained the securities and control of Klein without the purchase of respondent's contract and his accompanying resignation. It is entirely clear that what the Court below meant when

it said that Stone was giving up a valuable contract "which would not be rescinded by Klein" was that while respondent's employment continued and the control of Klein was as it was, there was, as a practical matter, *no possibility whatever* that respondent's contract would be terminated or rescinded by Klein.

(5) Numerous cases are cited on pages 15 and 16 of petitioner's brief to the effect that misrepresentation upon a material point will justify rescission. The doctrine of the cases cited is not questioned herein; but they have no bearing upon the instant case, where (as shown above) (1) there was no sufficient proof of any representation made by respondent; and (2) if it be assumed there was any representation, the same was *true*.

On page 32 of petitioner's brief cases are cited to the effect that the officers and directors of a corporation act in a fiduciary capacity in handling its affairs—no one disputes that proposition; but it has no relevancy to the facts disclosed herein. Similarly, it is said, on page 33 of the brief, that under the law of New York an employee or agent may be discharged before the expiration of his term for negligence or inefficiency—that statement also is not open to question, but it has no application herein.

In like manner there are a very great number of other cases cited throughout the petition and brief; but upon analysis it appears without exception that they have no bearing upon the questions presented herein.

(6) The petition and brief (in connection with the above-mentioned checks for $50,000 and $13,000) refer repeatedly to what are therein termed respondent's "admissions of misconduct" and "admissions of conversion" of funds of the corporation. It is hardly necessary to say that

there were no "admissions of misconduct" by the respondent—the whole record shows the contrary. The check transactions (as shown above) were entirely proper; they were had with proper authorization; they were fully disclosed on the books of the corporation; and no objection was ever made thereto.

Both the petition and brief are filled with extravagantly improper and wholly unfounded and unjustified characterizations of respondent's conduct, such as "defalcations", "depredations" ("petitioner's depredations" they are termed on page 3 of the petition), "conversion" of funds and of other personalty, and the alleged "fraudulent write-off." These expressions, by frequent repetition, are sought to be given some weight; but it has been said that "Calling names does not alter facts"; and the *facts* are all against the petitioner.

The alleged conversion of other personalty has reference, in the last analysis, only to the used *radio,* whereof there was in the testimony no proof whatever of any conversion by respondent. As to the alleged "fraudulent write-off" of charges for merchandise in respondent's account, the proof clearly negatives any fraud. It might be noted that respondent's five per cent of the net profits (under his employment contract) had been accruing since the preceding September—they would in ordinary course more than offset the charges against respondent on the books; petitioner, by taking over the business at the end of February, made such an off-set impossible; and it was, therefore, entirely reasonable and proper that respondent should insist upon petitioner's consent to the said write-off as part of the whole transaction. That consent was given in Kuchai's letter to respondent, dated February 9, 1946 (Plaintiff's Exhibit 9). As respondent testified, part of the consideration for the sale of his contract, whereby his employment

with Klein was terminated, was the cancellation of the charges in his account (f. 222). If there was any misrepresentation to Klein in this connection, Klein alone would have a right to object thereto— and Klein never made any objection. Respondent's denial that he ever told Kuchai, petitioner's president, that the merchandise charged to him was mainly distributed for the benefit of the business stands uncontroverted—it is significant that Kuchai was not called by petitioner to take the stand.

All of these matters, viewed in the light most favorable (or it may be said most charitable) to the petitioner, were nothing more than "*technical irregularities*", as they were termed by the Court below. There is not the slightest reason to suppose that, had the facts been as petitioner tried unsuccessfully to establish them, they would in any way have affected the closing of these transactions involving, as they did, respectively, amounts of $2,500,000 and $200,000.

(7) With respect to the alleged implied warranty, it is said, on pages 23-24 of petitioner's brief, that the Court below erred in holding that a warranty might not be implied with respect to an item not purchased for exploitation. The Court below said that a warranty would be implied only where the facts did not show a *contrary intention*. It is conceded throughout petitioner's brief that its intent and purpose in acquiring respondent's employment contract was to terminate and extinguish it, rather than to perform or exploit it. An implied warranty upon the sale of personalty is one of *fitness for the purpose* for which it is intended; and where the intent is the extinguishment of the subject matter, there will, manifestly, be no implied warranty other than that of fitness for the purpose intended, that is, its termination or extinction. The Court was, there-

fore, right in holding that there did not exist herein the implied warranty contended for by petitioner.

(8) It is said, on page 25 of petitioner's brief, that the Court below ignored "the sheer magnitude of the $200,000 purchase price as compared with what respondent was to receive under the employment contract itself"; and in its further effort to minimize the importance and belittle the value to respondent of his employment contract, petitioner says (on p. 18) that "for the fiscal year ended September 30, 1944, respondent's share of the profits under the employment contract was $4,309.96." Petitioner does not go as far as to say (as it did in its reply brief in the Court below) that respondent conceded his 5 per cent. for the year ending September 30, 1944 was approximately $4,000. The fact is, of course, that Klein was not incorporated until about April 15, 1944; and therefore, the sum above mentioned represented respondent's percentage only over a period of *5½ months*—a period which was, moreover, one of adjustment to new conditions and of making allowances and expenditures for improvements, which operated to reduce the amount of respondent's percentage even for that limited time (f. 307).

Petitioner's statements in this connection are on a par with the evasive testimony of Diamond. His testimony on many points was apparently designed to convey a misleading impression, until in each instance the Trial Court pinned him down and by its questions brought out the actual facts (see Diamond's testimony, particularly as to whether petitioner wanted respondent out, fols. 372-375; and in other instances at fols. 360-361, 362, 333-335, 337-338, 345-346). Diamond's testimony throughout was lacking in the frankness and candor which the Court had a right to expect from a member of the bar. It culminated in his absurd assertion

that the covenant restraining respondent, during a period of six years, from taking an executive position with any ladies' department store in the Borough of Manhattan, was inserted in his contract with petitioner at respondent's request.

(9) It is said, on page 27 of petitioner's brief, that the fact that the two contracts with petitioner were made on the same day affords no basis for the conclusion that the making of one formed part of the consideration for the making of the other; and petitioner cites (on pages 10, 27 and 29 of its petition and brief) the case of *Petze* v. *Leary*, 117 App. Div. 829, in support of its position. Petitioner quoted from the opinion in that case in its brief in the Court below; but omitted to quote from the opinion the next succeeding paragraph to the effect that if the making of the contract with the corporation had been the consideration for the promise of the individual defendant (sought to be enforced against him in the action) or if the plaintiff therein was induced to enter into the contract with the corporation by reason of the defendant's promise, there would have been a sufficient consideration for defendant's promise. In the instant case the proof shows such consideration, for it clearly established that respondent would not have consented to the sale of the securities of Klein to the petitioner if petitioner had not made the separate promise to acquire respondent's interest in his employment contract.

Conclusion.

The substantially uncontroverted proof herein established that respondent had rights of great value which he transferred to petitioner in exchange for its unfulfilled

promise—that the whole purpose of petitioner is to get out of its bargain.

The judgments of the Courts below were right; and no reason is shown why their enforcement should be further delayed.

The petition for a writ of certiorari should be denied.

Respectfully submitted,

THOMAS A. GAFFNEY,
Counsel for Respondent.

RALPH STOUT,
Of Counsel.